

Fair Justice Task Force

Subcommittee on Mental Health and the Criminal Justice System

Tuesday, December 12, 2017
Conference Room 119, Arizona State Courts Building
1501 West Washington Street
Phoenix, AZ 85007

Present: Kent Batty, Chair, Susan Alameda, Mary Lou Brncik, Jim Dunn, Vicki Hill, Josephine Jones, Kathleen Mayer, Judge Joe Mikitish, Dr. Dawn Noggle, Dr. Carol Olson, Nancy Rodriguez, Dr. Michael Schafer, Mary Ellen Sheppard, Judge Susan Shetter, Commissioner Barbara Spencer, Judge Christopher Staring, Lisa Surhio, Sabrina Taylor, Paul Thomas, Juli Warzynski

Absent/Excused: Dr. Tommy Begay, Detective Kelsey Commisso, India Davis, Danna Whiting

Administrative Office of the Courts (AOC) Staff: Theresa Barrett, Jennifer Greene, Don Jacobson, Jodi Jerich

Member(s) of the public: Judge James MacDougall (ret.)

I. Welcome, opening remarks, and approval of minutes

The December 12, 2017 meeting of the Fair Justice Task Force Subcommittee on Mental Health and the Criminal Justice System was called to order at 10:05 a.m. by Kent Batty, chairman.

Mr. Batty called the members' attention to two new meeting dates: January 18, 2018 and February 12, 2018.

II. Approval of minutes

The draft minutes of the November 13, 2017 meeting were presented for approval.

Judge Staring made a motion to amend the minutes regarding his remarks to change the phrase "made threats" to "encountered" on page 2.

Motion: To approve the November 13, 2017, meeting minutes, as amended. **Action:** Approve. **Moved by:** Susan Alameda. **Seconded by:** Kent Batty. Motion passed unanimously.

III. Update on Subcommittee's Recommendations reported to the Fair Justice for All Task Force.

Don Jacobson, Senior Consultant to the Administrative Office of the Courts (AOC), gave a report recounting his presentation of the Subcommittee's recommendations to date to the Fair Justice Task Force (Task Force). He noted that the recommendations of the Subcommittee were generally well received. Don shared that the Task Force gave its unanimous support to the administrative order and its corresponding policies and procedures. These documents were developed by the Subcommittee to give guidance to Presiding Judges if they choose to authorize limited jurisdiction courts to conduct Rule 11 proceedings. Don informed the members that the AOC will distribute these documents to the Presiding Judges through a statewide memorandum.

Next, Don informed the Subcommittee that the Task Force discussed the proposed changes to Rule 11.5 and returned the proposal to the Subcommittee for further review. Don noted that AOC staff attorney, Ms. Jennifer Greene, will discuss this matter later in the meeting.

Finally, Don said that the Task Force did not have time to discuss the Subcommittee's other recommendations. However, Task Force Chairman Dave Byers noted that even without formal action by the Task Force, the AOC will be moving forward with these recommendations. He noted that discussions have already begun with the AOC's IT department to develop a central repository for Rule 11 records. Don anticipates that a project outline will be developed in time for the Task Force's next meeting in April 2018.

IV. Review Revised Rule 11.5

Jennifer Greene, AOC Staff Attorney, reported that the Task Force discussed at length the Subcommittee's recommended changes to Rule 11.5. The Task Force expressed support for the Subcommittee's substantive change to allow a presiding judge to give a limited jurisdiction court (LJC) authority to order competency restoration treatment when the LJC finds a defendant to be incompetent but restorable. However, the Task Force returned the proposal to the Subcommittee for further review regarding what an LJC may do if a defendant is found to be incompetent but not restorable. The Task Force asked the Subcommittee to consider three different options. These are:

1. The LJC must transfer the case to the superior court for further proceedings.
2. The LJC must dismiss on the State's motion.
3. LJC may either dismiss the case or transfer the case to the superior court. The superior court may either dismiss, initiate civil commitment proceedings pursuant to Title 36, or appoint a guardian.

Ms. Greene also noted that the day prior, the Supreme Court as part of its December Rules Agenda approved a rule petition that addressed changes to Rule 11 relating to the use of out of court statements made by a defendant to the evaluating physician. Ms. Greene noted that the Order has not yet been issued, so at this time we are unclear whether the changes adopted to the Rule conflict with the Subcommittee's proposed changes. Staff will inform the members of any conflict once the Order has been issued.

The members discussed the three options presented to them from the Task Force. Members agreed that the third option, giving the LJC the ability to dismiss the case or transfer it to the superior court, afforded the most flexibility.

Finally, the members discussed what the process would look like when an LJC transfers the case to superior court. A public defender member said that it has been her experience that the LJC will dismiss a case once the superior court renders a decision in the transferred matter. She stated that in Rule 11 matters, the city prosecutor and city public defender appear in superior court along with the county attorney and public defender. A city prosecutor member agreed that city attorneys go to superior court when a case is transferred in Rule 11 proceedings. Members opined that there would likely be a similar process if an LJC court would transfer a case to superior court for civil commitment proceedings. Paul Thomas, Court Administrator for the Mesa Municipal Court, offered to have the Mesa City Prosecutor come to the next Subcommittee meeting and talk with the members about how his office handles city cases that get transferred to superior court.

Motion: To recommend that Rule 11 be amended to allow an LJC to either dismiss a case or transfer it to the superior court when a defendant is found incompetent and not restorable.

Action: Approve. **Moved by:** Lisa Surhio. **Seconded by:** Judge Shetter. Motion passed unanimously.

V. Overview of COSCA White Paper

The Chairman provided an overview of the 2017 Policy Paper issued by the Conference of State Court Administrators (COSCA) entitled, “*Decriminalization of Mental Illness: Fixing a Broken System.*”

Don Jacobson informed the Subcommittee that the AOC was awarded a grant from the State Justice Institute to engage the National Center for State Courts (NSCS) to assist the AOC with developing protocols that address the fair treatment of persons with mental health issues who appear before local presiding judges in criminal cases. The work that will be accomplished with this grant is directly related to the Subcommittee’s charges to “identify ways courts can more effectively address individuals in the justice system who have mental health issues” and to “develop a Model Protocol Guide for Presiding Judges to use in the implementation of the Task Force’s recommendations.” This project is consistent with the COSCA policy paper’s recommendation that court leaders engage stakeholders and develop plans and protocols to decriminalize mental illness.

The Chairman introduced Judge James McDougall (ret.) and asked him to address the Subcommittee. Judge McDougall said that he supports the Court taking a leadership role in this very important issue of fair justice for persons with mental illness. He stated the Sequential Intercept Model (SIM) plays an important role in early identification and diversion of persons with mental illness. Finally, Judge McDougall expressed a desire to make Assisted Outpatient Treatment (AOT) as a method for early intervention and treatment for mentally ill persons. AOT

can treat people before they reach a crisis health state. Judge McDougall stated AOT can be cost effective, provide early mental health care treatment, and make communities safer.

Judge McDougall said that he supports the premise of the COSCA policy paper to amend statutes to allow courts to order involuntary mental health care if the court finds a person to be “incapacitated.” He opined that Arizona’s system for Assisted Outpatient Treatment (AOT) is not true AOT, which would permit courts to address the problems of these individuals before hospitalization or contact with law enforcement. Instead, he called it a “combined” in- and out-patient system. He said Arizona’s “persistently and acutely disabled” (PAD) standard is close to this incapacity standard, but is not identical. An incapacity standard is a lower standard than the PAD standard. He emphasized that he does not recommend the elimination of the current statutory standards for court-ordered treatment, but would ask that an additional standard of “incapacity” be added for the purpose of court-ordered AOT. Judge McDougall acknowledged that if more intensive inpatient treatment were necessary, due process concerns may require a subsequent court hearing with a finding that the person met one of the currently existing statutory standards for treatment.¹

Members commented that Arizona’s statutes for civil commitment are very good and provide much flexibility. They agreed the PAD standard is broad. The Subcommittee noted that Arizona law already allows a court to order AOT without first requiring inpatient treatment.

The members next discussed the reality that many persons who do receive inpatient treatment are released soon after they are stabilized, without sufficient regard for their capacity to sustain the necessary treatment. Once released, many persons do not receive adequate outpatient care, experience challenges with housing and employment, stop taking their prescribed medications and begin to self-medicate using street drugs, and, ultimately, decompensate. Many people then return to a state of crisis.

The Subcommittee discussed the challenge of funding effective mental healthcare programs for persons who are not eligible for Title 19 (Medicaid) funding. The members acknowledged a need for private healthcare reform in a way that provides meaningful and sustained mental healthcare treatment. Judge McDougall said that a person who is not Title 19 eligible will not be accepted into many AOT programs, leaving inpatient treatment as the only option.

Judge McDougall stated that he is now in private practice and has had clients with adult children who need mental healthcare treatment but who are not willing to get it. He said these parents find the court system extremely difficult to navigate. He shared that he is involved in the drafting of two pieces of possible legislation relating to mental health. One bill relates to the screening and evaluation statutes of Title 36. Additionally, he will meet with State Senator Nancy Barto in the near future to discuss his thoughts on AOT. The Subcommittee requested that Judge McDougall keep it apprised of his legislative efforts.

¹ To order a person to undergo outpatient or inpatient treatment, ARS § 36-540 requires a court to find by clear and convincing evidence that a person, as a result of a mental disorder, is either (1) a danger to self, (2) a danger to others, (3) gravely disabled, or (4) persistently and acutely disabled and is in need of treatment and is unwilling or unable to accept treatment.

Improved Public Access to Information on the Civil Commitment Process

One member suggested that funds be allocated for an office where people can get information or assistance regarding petitions for court ordered treatment. The chairman noted that while courts have very helpful self-service centers that provide information on many legal matters, they generally offer little information about the civil commitment process.

Develop Forms to Follow Person Through the Intercept Points

The Chairman expressed a desire for the Subcommittee to discuss at future meetings, the possibility of recommending that a form (or forms) be developed that would follow persons from initial contact with law enforcement, through the criminal justice system, and any civil commitment proceedings, for the purpose of ensuring that vital details of a person's contacts with elements of the justice system are not lost along their journey. The Chairman reminded the members that this idea was first espoused by Flagstaff Police Sergeant Cory Runge at an earlier Subcommittee meeting.

Data Collection

A judge member expressed a desire for the justice system to strive to treat all persons humanely, including those who are mentally ill. By developing protocols that provide courts with the tools needed to drive people to appropriate services, the justice system can achieve the Court's mission of "Fair Justice." Members expressed a desire for Arizona to do a better job at collecting outcome data to show that diversion from the criminal justice system into mental health treatment programs reduces recidivism and makes our communities safer. With better data collection, it could be proven that effective mental health care treatment reduces criminal justice costs. One member stated that the City of Mesa has done calculations on the criminal justice costs for misdemeanor trespass cases, and believes that data could show that redirection of funds toward treatment and housing could produce a long-term cost savings. Another member mentioned that the Drug Treatment and Education Fund (DTEF) provides a report every year that shows that diversion to treatment instead of incarceration for substance abuse offenses results in a cost saving of approximately \$11 million - \$13 million a year. DTEF is administered by the Adult Probation Services Division of the AOC. Other members stated that the Subcommittee should consider a recommendation to the Task Force urging better data collection.

Other Matters

In a roundtable fashion, the members discussed other possible items for further discussion at future meetings. These included:

- a. Whether the Subcommittee should recommend that the Task Force develop processes to collect outcome data to prove the efficacy of mental health courts and the resultant cost savings of diverting persons to treatment and away from incarceration.
- b. Whether the Subcommittee should investigate avenues where the courts may assist persons who need information on the civil commitment process or need assistance pursuing a court-

ordered evaluation.

- c. How the Subcommittee can best advocate for the use of advance directives to get persons into mental health treatment when needed.
- d. Whether the Subcommittee should recommend to the Task Force statutory changes to direct mental health professionals to inquire into a person's past willingness to participate in treatment when conducting evaluations.
- e. Discuss how the Subcommittee can continue its work and if that continuation should be through the creation of a standing committee or the continuation as a subcommittee of the Task Force.
- f. Whether the Subcommittee should recommend to the Task Force that it develop a form that tracks a person through the five sequential intercept points thereby providing law enforcement, judicial officers, and mental health treatment providers a comprehensive compilation of notes from persons who encountered the person throughout the criminal justice process.

VI. Recommendation regarding centralized locations for court ordered medical evaluations in Rule 11 proceedings

In the interest in addressing other agenda items, this matter was tabled.

VII. Recommendation to create a workgroup to consider legislation to change the definition of “mental disorder” in ARS 36-501(25)

The members reviewed a proposal to amend the statutory definition of “mental disorder” found in A.R.S. § 36-501(25). The proposal is an attempt to reduce to writing the comments expressed by several Subcommittee members during past meetings. The suggested change expands the definition of “mental disorder” to include neurological and psychiatric disorders, as well as mental conditions resulting from injury, disease, cognitive disabilities or co-occurring substance abuse disorders. After some discussion, the members voted on the following motion:

Motion: To recommend that the Fair Justice Task Force create a workgroup to consider amending the statutory definition of “mental disorder” as follows:

36-501. Definitions

In this chapter, unless the context otherwise requires:

25) “Mental Disorder” means a substantial neurological or psychiatric disorder of the person's emotional processes, thought, cognition, ~~or~~ memory or behavior, including mental conditions resulting from injury or disease, and cognitive disabilities as defined in A.R.S. § 36-551, and substance use disorders which co-occur with a mental disorder. Mental disorder is distinguished from:

~~(a) Conditions that are primarily those of drug abuse or alcoholism unless, in addition to one or more of these conditions, the person has a mental disorder.~~

~~(b)~~ (a) The declining mental abilities that directly accompany impending death.

~~(c)~~ (b) Character and personality disorders characterized by lifelong and deeply ingrained antisocial behavior patterns, including sexual behaviors that are abnormal and prohibited by statute unless the behavior results from a mental disorder.

Action: Approve. **Moved by:** Kathleen Mayer. **Seconded by:** Lisa Surhio. Motion passed unanimously.

VIII. Discussion of diminished capacity standard

The Subcommittee discussed the concept of a diminished capacity standard as a defense in criminal cases. The chairman asked Ms. Mary Lou Brncik to provide the Subcommittee her thoughts on this matter and to share her experience as a mother of an adult child who suffers from mental illness.

Mary Lou expressed her support for a diminished capacity defense. Mary Lou explained that this would allow for the admissibility of evidence that the defendant suffers from a mental illness and that this mental illness impaired the ability to appreciate the wrongfulness of the defendant's conduct. She explained that even though she is not an attorney, she understands that there are two components to a crime. First, the defendant must have committed the wrongful act. Second, the defendant must have had the requisite culpable mental state during the commission of the wrongful act. The diminished capacity defense would allow the defendant to introduce evidence at trial that the defendant suffered from a mental impairment that prevented him from forming the requisite mental state.

Discussion ensued. The members acknowledged that Arizona does not recognize a "diminished capacity" defense, and absent a guilty except insane defense, a defendant may not present evidence of a mental disease or defect alleged to have rendered him incapable of forming the requisite mens rea. However, the members noted that at the sentencing phase, a court may consider as a mitigating factor whether the defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired. (A.R.S. § 13-701(E)(2))

IX. Call to the public

No members of the public addressed the Subcommittee.

X. Adjournment

The meeting adjourned at approximately 2:14 p.m.